Avoiding an Odyssey – The EU's Accession to the ECHR

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Since 4 July 2013 the draft agreement for the EU's accession to the ECHR has been under scrutiny by the ECJ. In this context, Daniel Thym opened up a debate, concerning whether the EU's accession to the ECHR might be a "Trojan Horse" within the walls of EU law endangering its primacy. Marten Breuer rejected this insinuation: There is no "Donum Danaorum". While I share Breuer's result wholeheartedly, my line of reasoning differs, at least partly.

Like *both* authors, I am absolutely convinced that the EU's accession to the ECHR is to be welcomed. However, a mutual "Yes" of both the EU and the High Contracting Parties of the ECHR is not sufficient. The specificity of the EU as a supranational organisation and the state-orientated ECHR make modifications mandatory. The most important modification to the ECHR system is the so called "co-respondent mechanism," which lies at the heart of Daniel Thym's critique. It can be rephrased into three questions:

– Why should the EU member states (and not the EU itself) be the "primary" respondents before the ECHR, even if the member states act completely under the direction of EU law?

– Why is the EU's participation as "co-respondent" limited to cases, in which the conformity of EU law with the ECHR is at stake (leaving out cases which lie within the scope of EU law but give the member states room for manoeuvre)?

– Is there a danger for the primacy of EU law in that national courts might refrain from launching preliminary reference procedures because the ECJ could be consulted at a later stage (within the proceedings before the ECtHR)?

The right respondent

A comprehensive look at possible cases which involve the EU before the ECtHR has to take into account that the *indirect* implementation of EU law via the member states may be the rule (article 291(1) TFEU). However, the exception, namely the *direct* implementation of EU law by the EU itself, has major practical importance. Especially in economically significant areas such as trademarks, antitrust, and state aid, where it is the EU which makes decisions that affect the individual directly. He or she can challenge such acts before the EU courts. In these cases of *direct* implementation, the EU will be treated just like any other High Contracting Party of the ECHR. The individual may lodge his application – after having sought relief before the EU courts – directly against the EU. The EU is the right (and sole) respondent, because the EU is responsible for its acts being in line with the ECHR. In these cases, the EU member states remain at the sidelines.

Cases of *indirect* implementation of EU law are to be treated differently: Daniel Thym speaks of the "purists of the Community method" – who are they? They misjudge the EU's character as a multi-level-system, if they identify the EU as the "primary" respondent in these cases and assign the "sole legal responsibility" for a possible ECHR violation to the EU. From the perspective of the individual, he or she is affected by an act of national law, not supranational law. He or she launches proceedings at the national level. A possible preliminary reference procedure (if conducted at all) does not replace the final decision by the national court which is challenged by the application to the ECtHR. Therefore, it is – in line with the relevant case law of the ECtHR – correct to hold the respective member state accountable. It remains the right respondent in cases of *indirect* implementation of EU law.

The right co-respondent

Those who – like Marten Breuer – believe that the EU could be "primary respondent" when its member states

implement EU law, the latter being “co-respondents” in these cases, turn the rationale of the co-respondent mechanism around: the *creator* of the relevant law ought to be *co-respondent*, while the *implementer* of the law remains the relevant *respondent*. This follows also from article 3(3) of the Draft Accession Agreement, which has to be read in its entirety:

„Where an application is directed against the EU, the EU member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the EU has acceded *of a provision of the TEU, the TFEU or any other provision having the same legal value pursuant to those instruments*, notably where that violation could have been avoided only by disregarding an obligation under those instruments.“ (Emphasis and abbreviations added)

In other words: only when *EU primary law* allegedly violates the ECHR, the EU member states may join the proceedings as *co-respondents* (and can be held accountable as such by the ECtHR). Why is there no such restriction in the opposite scenario (in which the EU may join as co-respondent in applications against its member states)? The reason is that the rationale of the co-respondent mechanism applies to the EU member states only in the following (very unlikely) scenario: they create as “master of the treaties” (“Herren der Verträge”) the framework in which the organs of the EU operate. In cases in which not their (the EU’s) actions, but the framework (set by the EU member states) raises concerns with regard to the ECHR, the EU member states shall have the opportunity to defend “their” law as co-respondents. Equally they would be bound under international public law by an eventual judgment by the ECtHR to redeem the violation. The EU itself could not comply with such a judgment, because it cannot change the treaties on which it is founded itself.

In the opposite scenario, there is no reason why the EU member states should be *co-respondent*s in cases in which they implement EU law. They are not responsible for EU secondary law. Only the member state whose action has affected the applicant (and be it because it was bound under EU law to do so), bears a responsibility under international public law for the conformity of its actions with the ECHR. Therefore it is (and remains) the right respondent (not: co-respondent). The right co-respondent is the EU, if the (possible) violation of the ECHR was caused by EU law. This way the EU is held responsible for its law (see article 3(7) of the draft accession agreement).

The right threshold for the co-respondent mechanism

Consequently, the co-respondent mechanism will be activated, whenever an application calls into question the compatibility of EU law (of whatever legal rank) with the ECHR, notably where that violation could have been avoided only by disregarding an obligation under EU law. Daniel Thym argues that this threshold “has been defined too narrowly.” I disagree: there is no reason for the EU to join as *co-respondent*, if a violation of the ECHR could have been avoided by the EU member states because EU law granted them room for manoeuvre. In these cases, conformity with the ECHR can be achieved without changing EU law. In addition, one has to bear in mind that the participation of the EU as co-respondent makes the proceedings naturally more cumbersome and obliges the EU and the respective member state to coordinate their pleadings in Strasbourg.

Furthermore the non-participation as co-respondent does *not* exclude the EU from the proceedings. The option to join as a third party under article 36(2) ECHR remains intact and has been used successfully in the past (Bosphorus). This tool allows the EU to explain its law which often serves as a framework for the national law of its member states. See also paragraph 46 of the explanatory report: “It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case.“

However, it is important that the threshold will be applied correctly. The EU *must* join as co-respondent, if EU law has caused the (alleged) violation of the ECHR. Tobias Lock was right to point to the relevant unilateral declaration, which is legally binding under international public law. The ECJ could call for an additional obligation under EU law to this effect. There is indeed no room for a political decision under article 218 paragraph 6 TFEU (and its practicability would be doubtful anyway).

Striking the right balance between autonomy and primacy of EU law

The draft agreement is obviously keen to protect the autonomy of EU law and the ECJ's monopoly of interpretation. This is understandable against the background of Opinion 1/91 in which the ECJ raised such concerns with regard to the EEA agreement. These legitimate concerns can be met without endangering the primacy of EU law. Here I agree with Marten Breuer: the *obligation* for national courts of last resort under article 267(3) TFEU to launch a preliminary reference procedure remains unchanged by the EU's accession to the ECHR. If the ECJ fears that this could be forgotten (with a view to the psychology of judges), it can include a clarification of this matter of course in the Opinion.

I believe that the attractiveness of the preliminary reference procedure (especially with regard to the *right* to launch such proceedings under Article 267(2) TFEU) is linked to its use to solve cases: short proceedings, convincing judgments and the possibility to circumvent undesired national law (including case law by higher courts) are the relevant factors. They remain unaffected by the EU's accession to the ECHR and stay in the hands of the ECJ.

I further agree with Marten Breuer, that a possible lack of effectiveness is rooted in the current structure of EU law, which does not provide for a mechanism to secure that preliminary reference procedures are launched in all relevant cases. The accession to the ECHR makes this visible: the ECJ was quick to identify the danger that external control (by the ECtHR) takes place before internal control (by the ECJ) could be exercised. This is the reason why article 3(6) of the accession agreement grants the ECJ sufficient time to check the compatibility of the relevant EU law with the ECHR. However, such "prior involvement" of the ECJ is only necessary, if the conformity of EU law with the ECHR is at stake in Strasbourg. This should only be the case when the EU has joined as co-respondent.

In the long run, the ECJ may profit from an open-minded attitude towards the ECtHR. To secure that violations of the obligation to launch a preliminary reference procedure do not remain without consequences, the ECtHR could tighten its case law with regard to a possible violation of article 6(1) ECHR. This would not only increase the effectiveness of EU law but also create a true relationship of cooperation between the ECJ and the ECtHR. Obviously, such a development can only be encouraged, but not coerced.

The right response

The "clear-cut" response that was advocated by Daniel Thym, that is to instruct re-negotiations, would require the ECJ to hold that the draft accession agreement violates EU primary law. This harsh verdict can hardly be built on vague fears regarding the primacy of EU law. Furthermore, it is far from certain that a new agreement could be reached quickly. The instructions given by the ECJ may be crystal clear – they are not binding whatsoever for the High Contracting Parties of the ECHR that are not EU members.

My mythological answer would be: Avoid another Odyssey! It is well known that the ECJ stopped plans for the accession of the (then) European Community to the ECHR with Opinion 2/94. It took more than a decade until this hurdle was removed (by the new article 6(2) TEU which came into the force with the Treaty of Lisbon). Rather than blowing the Commission on the open sea of negotiations, it should keep them in the port and render the draft accession agreement to be in conformity with EU primary law. The ECJ can live up to its responsibility for the integrity of the EU legal order by asking for safeguards in EU law and by clarifying that the obligation to launch preliminary reference procedures remains unaffected. This approach would follow the way in which other (national) constitutional courts assess the conformity of international treaties with internal (constitutional) law. The ECJ would proceed on its way to become itself a true constitutional court for the EU.

SUGGESTED CITATION Streinz, Thomas: *Avoiding an Odyssey – The EU's Accession to the ECHR, VerfBlog,* 2013/9/30, http://verfassungsblog.de/avoiding-an-odyssey-the-eus-accession-to-the-echr/.